No. 02-675

Supreme Court, U.S.
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In The
Supreme Court of the United States

SHELDON SILVER, ABE ALPER, JON GREENFIELD, JACK LEE, RABBI MOSHE PORTNOY, RICHARD SCHWARTZ, AGUDATH HARABONIM OF THE UNITED STATES AND CANADA, AGUDATH ISRAEL OF AMERICA, NATIONAL COUNCIL OF YOUNG ISRAEL, RABBINICAL ALLIANCE OF AMERICA, RABBINICAL COUNCIL OF AMERICA, TORAH UMESORAH-NATIONAL SOCIETY OF HEBREW DAY SCHOOLS and UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA,

Petitioners,

v.

COMMACK SELF-SERVICE KOSHER MEATS, INC. d/b/a COMMACK KOSHER, BRIAN YARMEISCH, and JEFFREY YARMEISCH,

Respondents,

and

RABBI LUZER WEISS, AS DIRECTOR OF THE KOSHER LAW ENFORCEMENT DIVISION OF THE NEW YORK STATE DEPARTMENT OF AGRICULTURE AND MARKETS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

Respondent Commack Self-Service Kosher Meats, Inc., d/b/a Commack Kosher, has no parent or subsidiary corporations and no public corporation holds any of said Respondent's stock.

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

Respondents Commack Self-Service Kosher Meats, Inc., d/b/a Commack Kosher, Brian Yarmeisch and Jeffrey Yarmeisch respectfully respond to the petition of Sheldon Silver, Abe Alper, Jon Greenfield, Jack Lee, Rabbi Moshe Portnoy, Richard Schwartz, Agudath Harabonim of the United States and Canada, Agudath Israel of America, National Council of Young Israel, Rabbinical Alliance of America, Torah Umesorah-National Society of Hebrew Day Schools and Union of Orthodox Jewish Congregations of America [hereinafter the "Petitioners"] for a Writ of Certiorari to review the decision of the United States Circuit Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The Petitioners bring on this Petition for a Writ of Certiorari in an attempt to reverse the opinion of the United States Court of Appeals for the Second Circuit, reported at 294 F.3d 415 (2d Cir. 2002), a copy of which is set forth in Appendix A to the Petitioners' Petition; an opinion which affirms the decision of the United States District Court for the Eastern District of New York, *Commack Self-Service Meats v. Rubin*, 106 F.Supp. 2d 445, a copy of which is set forth at Appendix C of the Petitioners' Petition.

COUNTER-STATEMENT OF THE CASE

The underpinning of this case is the unconstitutionality of §201-a, §201-b, §201-c, §201-e, §201-f, §201-h and §26-a of the New York State Agriculture & Markets Law [hereinafter the "Statute"], pursuant to which the State interprets and enforces Jewish religious doctrine. The Statute purports to prevent or punish fraud in the sale of *kosher* food products.

The Petitioners expose the fatal flaw in their position in the very question they present, to wit: by arguing that it is constitutional for the State to accept an undefined consumer consensus as a basis for legislation denying non-orthodox Jews of the freedom to practice their religion.

While over the years the term "*kosher*" has been incorporated into the vernacular, *kosher*, in the context of the challenged statute, speaks the dogma of Judaism. It is generally conceded that, even within the orthodox Jewish community, there is no unanimity in the interpretation of the laws governing what is *kosher*. The result is that "to assert that a food article does not conform to *kosher* requirements, New York must take an official position as to what are the *kosher* requirements. In doing so, the [State] must either interpret religious doctrine or defer to the interpretations of religious officials and reach its official position." *Commack Self-Service Kosher Meats, Inc. v. Weiss,* 294 F.3d 415, 427 (2d Cir. 2002).

The problem is compounded by the fact that the Jewish laws, which the challenged Statute attempts to regulate, are found in the *Torah,* the first five books of the Jewish scriptures, and in the *Schulchan Aruch*, the Code of Jewish Law. The unconstitutionality of the Statute is underscored by the fact that the *Torah* and the *Schulchan*

Aruch are written in Hebrew and Aramaic. While the *Torah* has been translated into English, the *Yoreah Deah* tractate of the *Schulchan Aruch,* dealing with the laws of what is *kosher*, has not been translated into English. While there are commentaries in English on the *Yoreah Deah,* as a predicate to enforcing the Statute the State would have to determine which commentary was sufficiently authoritative to justify the State's reliance thereon. Of course, such approach ignores the fundamental truth that the *Schulchan Aruch* contains lengthy debates by Rabbis who try to interpret the laws and who are not always in agreement.

In the Jewish religion there is no one equivalent to the Pope and in the lower Courts it was undenied that *Pirkei Avot*, a compendium by Jewish sages of *Talmudic* legal rulings and *Halachic* axioms relating to the Jewish view on the sanctity of life and the ethical and moral principles guiding the Jewish way of life, mandates that one "get yourself a Rabbi." It is the Rabbi an individual selects who is the final authority for that person with respect to matters of Jewish law and practice. In support of such concept, Jewish law mandates that once a question has been posed to a Rabbi about Jewish observance and the Rabbi has rendered a decision, the question cannot be posed to another Rabbi. No Rabbi outranks another and, therefore, the observance of Judaism varies from Rabbi to Rabbi and community to community.

Just as the Protestant faith is comprised of many denominations, running the gamut from the Evangelical and Pentecostal sects to the Unitarian Universalist churches, in Judaism there are, *inter alia*, Hasidic sects, Orthodox Jews, Modern Orthodox Jews, Union for Traditional Judaism, Conservative Jews, Reform Jews and

Reconstructionist Jews. The orthodox Jewish community has publicly announced that non-orthodox denominations of Judaism are not legitimate sects of Judaism and the State of New York has been deferential to orthodox Judaism by attempting to enforce the Statute without regard to the fact that, in addition to the lack of unanimity of opinion, even amongst orthodox Jews, as to the Jewish *kosher* laws, non-orthodox denominations of Judaism have a different perspective on the Jewish *kosher* laws.

As the Second Circuit found:

> [T]here is considerable disagreement over what precepts or tenets truly represent the laws of kashrut. There are differences of opinion concerning the application and interpretation of the laws of kashrut both within Orthodox Judaism and between Orthodox Judaism and other branches of Judaism. *Ran-Dav's County Kosher v. New Jersey*, 129 N.J. 141, 147, 608 A.2d 1353 (1992) (citing Herman Wouk, *This Is My God* (1959), reprinted in *The Life of Torah* 98-99 (Jacob Neusner ed. 1974); Rabbi Hayim Halevy Donin, *To Be a Jew* 102-04, 112-19 (1972); Rabbi J. David Bleich, *Contemporary Halakic Problems* 84-92 (1977)). For example, Orthodox Jews of the Sephardic sect adhere to "glatt" kosher standards that are more stringent than those followed by other Orthodox Jews. Raphael Poliakoff, *What Is Glatt Kosher?*, Kashrus Newsletter, vol. 1, no. 5. As between different branches of Judaism, "Conservative and Orthodox rabbis differ sharply on many . . . issues" such as the kosher status of wine, cheese, sturgeon, and swordfish. Mark A. Berman, *Kosher Fraud Statutes and the Establishment Clause: Are They Kosher?*, 26 Col. J.L. &

> Soc. Probls. 1, 8 (1992). It is also widely recognized that "the strain between all three denominations [Orthodox, Conservative, and Reform] has increased in recent years." *Id.*
>
> We find it indisputable that there are differences of opinion within Judaism regarding the dietary requirements of *kashrut*. As a result, because the challenged laws interpret "kosher" as synonymous with the views of one branch, those of Orthodox Judaism, the State has effectively aligned itself with one side of an internal debate within Judaism. *Commack*, 294 F.3d 415.

The State's adoption of "orthodox Hebrew religious requirements" as the criteria is analogous to the State of New York declaring that, since Catholicism was the first denomination of Christianity, if another denomination of Christianity offered its members communion, they could only use a Eucharist and wine approved by the Roman Catholic Church; otherwise, the communion was illegitimate and the one offering communion was knowingly perpetrating a fraud. Similarly, are the Orthodox Christian sects (Russian, Armenian, Greek, etc.) perpetrating a fraud on their adherents because they do not celebrate Christmas and Easter when the other Christian faiths observe same?

The unavoidable conclusion is that in the State's attempt to regulate what is or is not *kosher*, "the State has effectively aligned itself with one side of an internal debate with Judaism," *Id.* 426, and has excessively entangled the State in religion. While the Petitioners concur with, and adopt, the findings of the courts below both as to the facts and the legal analysis, and incorporate same by reference herein, the Petitioners' reliance on an undefined

consensus has apparently escaped the District Court's and Circuit Court's attention.

The concept of the State legislating a religious issue, even if well intended to prevent consumer fraud, based upon an alleged consensus cannot pass constitutional muster. Who comprised the consensus? Who determined that the individuals/organizations comprising the consensus were knowledgeable and authoritative and, if so, who determined their knowledgability and authoritativeness? What criteria were used to judge the members of the purported consensus? What inquiry did the State make before adopting the alleged consensus?

In fact, whatever may have been the case in prior generations, the Petitioners would be misleading this Court to suggest that the orthodox Jewish community finds food designated *kosher* to be acceptable. Especially since the influx of Jewish immigrants after World War II, which immigrants have introduced their own customs and standards, the orthodox Jewish community has, by and large, rejected the designation *kosher* as adequate even where it was so designated by a duly ordained orthodox Rabbi. As the record below establishes, the orthodox Jewish community generally demands more stringent adherence to their interpretation of Judaism's *kosher* laws. As a practical matter, most orthodox Jews confine themselves to eating only "glatt *kosher*" meat[1] or food; food

[1] The bigger fraud would appear to be the fact that, despite the fact that poultry cannot be *"glatt" kosher*, some supervising agencies, including one of the Petitioners, designate poultry as *"glatt" kosher*. One of the Petitioners recently conceded that it no longer uses the term *"glatt"* to represent only *"glatt"* quadripeds, which is the only type of

(Continued on following page)

allegedly held to a more stringent level of observance of the Jewish *kosher* laws. One unavoidable fact is that the Statute enmeshes the State in the interpretation of Jewish doctrinal law.

REASONS WHY THE PETITION FOR CERTIORARI SHOULD BE DENIED

I

THE SECOND CIRCUIT PROPERLY ANALYZED THE APPLICATION OF THE ESTABLISHMENT CLAUSE

The Petitioners argue that because other states have enacted legislation which parallel the patently unconstitutional statute, this Court should intervene to reverse the Circuit Court's findings and decision. The Petitioners predicate their argument on the premise that if one knowingly sells something as *kosher* which is not *kosher* in accordance with "orthodox Hebrew religious requirements" one is perpetrating a fraud.

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animal to which the term can apply, but has adopted it as a designation of the product having met a higher standard. The then Director of the Division of Kosher Law Enforcement of the New York State Department of Agriculture and Markets [the "State"] testified at his deposition that even "*glatt*" *kosher* meat wasn't sufficiently *kosher* for him; he would only eat meat slaughtered under the supervision of a particular *hassidic* sect. Other orthodox Jewish witnesses, testifying on behalf of the Petitioners, conceded at their depositions that they too demanded a more stringent standard than *kosher* even if *kosher* was defined as "in accordance with orthodox Hebrew religious requirements."

It defies credulity that they propose such argument in light of the fact that it has been undenied that the "orthodox Hebrew religious requirements" are in a different language, either Hebrew or Aramaic, and the *Schulchan Aruch*, the text containing the *Yoreah Deah*, the tractate devoted to *kosher* issues, is characterized by a small amount of text surrounded by the commentary of sages of the time. It is critical to note that the *Yoreah Deah* reflects that on many issues there were disagreements between the commentators as to the meaning and/or implication of the text. The Petitioners' position notwithstanding, many say that that is one of the beauties of Judaism; one can follow the interpretations of the Rabbi they select to follow.[2] The differences of opinion between the commentators also probably explain, at least in part, why there is no translation of the *Yoreah Deah* tractate into English; only commentaries. The State conceded that it is unaware of any English translation of the *Yoreah Deah*.[3]

A factor which cannot be ignored is that, as reflected in the record below, the State's "enforcers" do not get any formal training in what purportedly constitutes *kosher* "in accordance with orthodox Hebrew religious requirements."

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[2] While not generally accepted, one of the renowned Rabbis whose commentaries are included in the *Yoreah Deah* opined that, since a chicken does not give milk, the reasoning behind the interpretation that one cannot mix milk products with dairy products [you cannot cook a goat in its mother's milk], a keystone of the *kosher* laws, would not apply to chickens and, therefore, it follows that, at least in that orthodox sage's opinion, a cheeseburger could be *kosher*.

[3] The Petitioners took an evasive position relying on commentaries of the *Yoreah Deah* well aware of the fact that, but for the fact that the commentators were not in agreement, one commentary should have sufficed.

According to the testimony adduced from the deposition witnesses, the inspectors' training has been comprised solely of accompanying an experienced inspector in their rounds for a period of time. As far as could be elicited from the deposition witnesses, including Rabbi Rubin who was then the Director of the Division, at the times relevant hereto, there were neither tests nor guide rules for inspectors to establish some uniformity in the interpretation as to what constitutes *kosher* in accordance with "orthodox Hebrew religious requirements." The State could not, or would not, produce any documents which were purportedly issued to inspectors which documents purportedly contained the rules governing what is *kosher* in accordance with "orthodox Hebrew religious requirements" or which otherwise established parameters for enforcement. Each inspector was evidently on their own. The lack of a more formal training program raises the spectre that the State of New York was well aware the the Statute infringed on the constitutional rights of non-orthodox Jews and felt that formal training or the issuance of written guidelines would only make the advocacy of orthodox Judaism ever more apparent.

As the record below establishes, the leading orthodox *kosher* supervisory agencies, including Petitioner Union of Orthodox Jewish Congregations, supported the formation of ACKO, also known as AKO, the basic purpose of which organization was to develop a uniform standard of what was *kosher* in accordance with "orthodox Hebrew religious requirements." Even they could not agree and, as far as can be discerned, the project was abandoned.

In apparent recognition that their position is, at best, tenuous, the Petitioners do not hesitate to wave the flag and appeal to mother, G-d and country. They argue that "[N]o Establishment Court decision of this Court has ever

invalidated a local law enacted to protect religiously observant Americans against deliberate deception by dishonest merchants who *intend* to defraud consumers." The argument is specious since, as previously set forth, there are no universally accepted rules as to what constitutes *kosher* in accordance with "orthodox Hebrew religious requirements." If the Petitioners were to prevail, the State would be directly interpreting and enforcing a fundamental tenet of Judaism, the *kosher* laws. The Petitioners would have this Court validate the State acting as a policeman of the religious observance of those who elect to deal in *kosher* foods.

It is respectfully submitted that before this Court entertains any idea of adopting the Petitioners' argument it examine the deposition testimony of David Zweibel. Mr. Zweibel, who identified himself as an officer and General Counsel to Petitioner Agudath Israel of America, testified that, notwithstanding the fact that he was a duly ordained orthodox Rabbi, he felt incompetent to answer questions about the Jewish laws governing what is *kosher;* he felt that it was too complicated and he, while an observant orthodox Jew, was too far removed from it to be in a position to offer any informed opinions beyond the most elementary facts. Mr. Zweibel's candor at his deposition only serves to underscore the Respondents' contention that it is not the State's place to attempt to oversee one's observance of the Jewish *kosher* laws.

Another fact which should not be overlooked is that to adopt the Petitioners' reasoning would deny Conservative Jews the right to practice their religion. A store selling *kosher* food targeting the Conservative Jewish *kosher* market would be in violation of the Statute for selling, *inter alia*, cheese, certain fish and wine which, while

acceptable under the Conservative Judaism's duly adopted, and published rules governing *kashruth,*[4] same are not generally accepted to be *kosher* in accordance with orthodox Hebrew religious requirements. The way the Statute is worded, even if such a proprietor was prepared to identify his store as Conservative *Kosher*, the store would be in violation because it did not observe in accordance with "orthodox Hebrew religious requirements" and, therefore, was in violation of §201-a(1) and §201-b(1). In fact, the orthodox Jewish community has been the beneficiary of a monopoly when it comes to *kosher* food. The Statue, at §201-a(1) and §201-b(1), requires anyone selling food, even *kosher* style food, which food is not *kosher* in accordance with orthodox Hebrew religious requirements to display a sign stating "non-*kosher.*" This rule transcends the mere issue of *kosher* food as it encompasses a sign/label identifying the food as "non-*kosher*" where there is no representation that the food is *kosher* but the food is labeled "Jewish" or "Hebrew" even if such designation is in a foreign language.

Petitioners would have this Court believe that the majority of consumers expect food identified as *kosher* to be *kosher* in accordance with "orthodox Hebrew religious requirements." This is a fiction contrived to bolster a weak case. The record below establishes that orthodox Jews patronize those establishments which are approved by the Rabbis they follow. They would not think to patronize a store that didn't have their Rabbis' approval except to purchase some pre-packaged food in which instance the

[4] *Kashruth* refers to the practice of keeping *kosher.*

food would have to bear the imprimatur of a *kosher* supervising agency approved by their Rabbi. The record reflects that, at the time the depositions were conducted, there were over 400 supervisory agencies identified by ***Kashrus Magazine***, a journal issued by an orthodox Jewish institution devoted to matters of *kashruth*. It is significant to note that ***Kashrus Magazine*** constantly reminds readers not to rely on the symbols of the various *kosher* supervision agencies listed without first consulting their Rabbi.

The State's adoption of "orthodox Hebrew religious requirements" as the criteria is analogous to the State of New York declaring that, since Catholicism was the first denomination of Christianity, if another denomination of Christianity offered its members Communion, they could only use a Eucharist and wine approved by the Roman Catholic Church; otherwise, the Communion was illegitimate and perpetrated a fraud. Similarly, are the Orthodox Christian sects (Russian, Armenian, Greek, etc.) perpetrating a fraud on their adherents because they do not celebrate Christmas and Easter when Catholicism and the other Christian faiths observe same?

The unavoidable conclusion is that in the State's attempt to regulate what is or is not *kosher*, "the State has effectively aligned itself with one side of an internal debate with Judaism," *Id.* 426, and excessively entangled the State in religion.

Petitioners' reliance upon this Court's decision in *Hygrade Provision Co. v. Sherman,* 266 U.S. 497 (1925), is misplaced. The Petitioners ignore the fact that the *Hygrade* case involved the Due Process Clause rather than the Establishment Clause. As the Petitioner should have recognized, it was not until some twenty (20) years after

the Court rendered the *Hygrade* decision that the Fourteenth Amendment was held applicable to the states. See *Everson v. Board of Education,* 330 U.S. 1, 15, 16 (1947).

> Like the Establishment Clause generally, the prohibition on excessive government entanglement with religion "rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." *Illinois ex rel. McCollum v. Bd. Of Educ.*, 333 U.S. 203, 212, 68 S.Ct. 461, 92 L.Ed. 649 (1948).
>
> It appears to us that the challenged laws excessively entangle government and religion because they (1) take sides in a religious matter, effectively discriminating in favor of the orthodox Hebrew view of dietary requirements; (2) require the State to take an official position on religious doctrine; and (3) create an impermissible fusion of governmental and religious functions by delegating civic authority to individuals apparently chosen according to religious criteria.
>
> The Department [Department of Agriculture and Markets of the State of New York] argues that the challenged laws do not excessively entangle the government with religion because "no one disputes the meaning of the term 'kosher.'" There is ample evidence in the record to support the opposite conclusion. *Commack*, 294 F.3d 426-428.

The State of New York has been deferential to orthodox Judaism by attempting to enforce the challenged statute without regard to the fact that, aside from the lack of unanimity of opinion amongst orthodox Jews as to the Jewish *kosher* laws, non-orthodox denominations of

Judaism have a different perspective on the Jewish *kosher* laws.

As the Second Circuit found:

> [T]here is considerable disagreement over what precepts or tenets truly represent the laws of kashrut. There are differences of opinion concerning the application and interpretation of the laws of kashrut both within Orthodox Judaism and between Orthodox Judaism and other branches of Judaism." *Ran-Dav's County Kosher v. New Jersey,* 129 N.J. 141, 147, 608 A.2d 1353 (1992) (citing Herman Wouk, *This Is My God* (1959), reprinted in *The Life of Torah* 98-99 (Jacob Neusner ed. 1974); Rabbi Hayim Halevy Donin, *To Be a Jew* 102-04, 112-19 (1972); Rabbi J. David Bleich, *Contemporary Halakic Problems* 84-92 (1977)). For example, Orthodox Jews of the Sephardic sect adhere to "glatt" kosher standards that are more stringent than those followed by other Orthodox Jews. Raphael Poliakoff, *What Is Glatt Kosher?*, Kashrus Newsletter, vol. 1, no. 5. As between different branches of Judaism, "Conservative and Orthodox rabbis differ sharply on many . . . issues" such as the kosher status of wine, cheese, sturgeon, and swordfish. Mark A. Berman, *Kosher Fraud Statutes and the Establishment Clause: Are They Kosher?*, 26 Col. J.L. & Soc. Probls. 1, 8 (1992). It is also widely recognized that "the strain between all three denominations [Orthodox, Conservative, and Reform] has increased in recent years." *Id.*
>
> We find it indisputable that there are differences of opinion within Judaism regarding the dietary requirements of *kashrut*. As a result, because the challenged laws interpret "kosher" as synonymous with the views of one branch, those of

> Orthodox Judaism, the State has effectively aligned itself with one side of an internal debate within Judaism. *Commack*, 294 F.3d 415.

Furthermore, in *Hygrade* this Court qualified its finding by stating that the meaning of *kosher* was well enough defined "at least as a general thing." In the over eight decades which have elapsed since the Hygrade decision was rendered, the world has changed. Sixty or seventy years ago when someone spoke of "grass" there was no confusion – the reference was to the plant that grew on lawns and on which cattle and other animals fed. Today, "grass" is widelyrecognized as synonymous with "marijuana." Similarly, in the not so distant past the word "gay" described a cheerful, lighthearted excitement or, especially in matters of color, bright or lively. Currently, it is synonymous with a sexual orientation.

The term *kosher,* like "grass" and "gay" and innumerable other words, has gone through a metamorphosis. The post-World War II influx of Jewish immigrants resulted in the introduction to the United States of customs and traditions in the observance of the *kosher* laws which the immigrants had observed in their homelands. It created even greater diversity in the meaning of what was *kosher*. As the record before the Second Circuit conclusively demonstrated, today something which is merely *kosher* is unacceptable to many, if not most, of the orthodox Jewish community. Today the majority of the orthodox Jewish community only finds meat and poultry that is *glatt kosher*, *kosher LeMahadrin* or supervised by a limited number of supervising agencies to be acceptable.

In the final analysis the Petitioners are challenging the legitimacy of non-orthodox denominations of Judaism

and, the rhetoric notwithstanding, would prevent non-orthodox Jewish purveyors from selling fresh meat and poultry, groceries and prepared foods as *kosher* despite the fact that duly ordained Rabbis find same to be acceptably "*kosher.*" The Petitioners, in their poorly disguised quest to proselytize, force non-orthodox Jews to become more orthodox in their observance, has no reluctance to deny non-orthodox denominations of Judaism the inalienable right to practice their bona fide religion merely because the orthodox Jewish community disagrees with the tenets of the non-orthodox denominations.

It is offensive that the Petitioners would draw a parallel between the religious observance of non-orthodox denominations of Judaism and the defendants in *United States v. Ballard*, 322 U.S. 78 (1944). The mere suggestion of any analogy confirms that the Petitioners are engaged in a gambit to eliminate what they have declared to be the inauthentic and illegitimate strains of Judaism and their utilization of the State of New York as an ally in such gambit having been successfully challenged they appeal to this Court to help them in their crusade.

II

THE SECOND CIRCUIT WAS FULLY JUSTIFIED IN FINDING THE STATUTE TO BE UNCONSTITUTIONAL

It is indefensible for the Petitioners to acknowledge on the one hand the existence of non-orthodox streams of Judaism and then to come before this Court arguing that the Statute does not take sides. The record contained incontrovertible proof that the Statute is partial to the

orthodox Jewish community to the detriment of the non-orthodox denominations of Judaism. While the Petitioners have the inalienable right to believe that orthodox Judaism is the only authentic Judaism, they have no right to have the State of New York discriminate against those who do not share their beliefs.

The Petitioners rely on the affidavits they submitted in support of their position in the Ran-Dav case, *Ran-Dav's County Kosher, Inc. v. New Jersey*, 129 N.J. 141, 608 A.2d 1353 (1992), *cert. denied*, 507 U.S. 952 (1993) to corroborate their claim that "orthodox Judaism's" *kosher* standards, whatever they might be, are central to the observance of *kashruth*. In the first instance the ten (10) year old affidavits upon which the Petitioners rely obviously, and justifiably, were not sufficient to sway this Court to grant certiorari. More telling, however, is that the Petitioners were unable to garner any such support in this action. To the contrary, the United Synagogue of Conservative Judaism, the parent body for Conservative Jewish congregations, joined in an *amicus* brief before the Circuit Court in support of the Respondents.

Petitioners proceed to attempt to draw an analogy between the tenets of faith of non-orthodox denominations of Judaism and laws regulating the sale of wool or food identified as organic. Clearly, one's constitutional right to observe their religion is inviolate and to suggest that religious observance can be regulated by the state in the same way it would regulate commercial products is preposterous.

While it may prove unfortunate, the statute is flagrantly violative of the rights of non-orthodox Jews and if, as a result of this Court allowing the decision below to

stand, the unconstitutional laws of other states are of questionable constitutionality that is a problem those states will have to deal with. It certainly is not a plausible justification for ignoring the unconstitutionality of the Statute.

The Petitioners dismiss the relevancy of the Kosher Advisory Board arguing that it has no legal or administrative power to determine the standards for the enforcement of the *kosher* laws; "[I]t is, as its title declares, 'advisory' only." The Respondents respectfully suggest that the record below demonstrates that the Kosher Advisory Board played a significant role in the enforcement of the Statute; certainly the transcripts of the meetings of the Kosher Advisory Board in the record below prove that Petitioners' contention is untrue.

The Second Circuit also found the Petitioners' contention that there was a complete absence of Kosher Advisory Board[5] involvement in enforcement activities to be less than wholly accurate. *Commack,* 294 F.3d 429.

Judge Miner, writing for the Circuit Court, put it as follows:

> Although members of the Board do not directly participate in enforcement activities such as the actual inspection of kosher food establishments, issuance of citations, or pursuit of court action against alleged violators, we decline to take such a narrow view of the Board's involvement with enforcement of the challenged laws. To conclude otherwise, would be to exalt form over substance

[5] New York State Agriculture and Markets Law §26-a.

in light of the broad powers granted to the Board that substantially affect enforcement of the challenged laws.

[3] While we acknowledge that "some limited and incidental entanglement between church and state authority is inevitable in a complex modern society," *Larkin,* 459 U.S. at 123, 103 S.Ct. 505, "[w]here 'fusion' [of governmental and religious authority] is an issue, the difference lies in the distinction between a government's purposeful delegation on the basis of religion and a delegation on principles neutral to religion, to individuals whose religious identities are incidental to their receipt of civic authority." [*Board of Ed. Of Kiryas Joel v. Grumet,* 512 U.S. [687] at 699, 114 S.Ct. 2481.] In our case, the Board's purpose – to advise the Department regarding the requirements of Orthodox Jewish dietary laws – and the fact that, of the six Rabbis on the Board, all are Orthodox, convince us that New York's delegation of authority to the Board was made on the basis of religion and not "on principlesneutral to religion, to individuals whose religious identities are incidental to their receipt of civic authority." *Id. at 699, 114 S.Ct. 2481.*

We find it insignificant that *section 26-a* does not require that Board members be Rabbis or even Orthodox Jews. Instead, we agree with the Fourth Circuit that even if membership [o]n the advisory Board were not restricted to adherents of Orthodox Judaism, or even if there were no [Advisory Board] at all, [the laws'] adoption of the Orthodox rules inevitably requires the intimate involvement of members of that faith, and the leaders of that faith, in discerning the applicable standard. *Barghout v. Bureau of Kosher*

Meat & Food Control, 66 F.3d 1337, 1343-44 (4th Cir. 1995); *Commack,* 294 F.3d at 429.

III

THE SECOND CIRCUIT PROPERLY ANALYZED AND APPLIED THE ESTABLISHMENT CLAUSE DECISIONS OF THIS COURT

The Court below unambiguously articulated its basis for rejecting the Petitioners' argument:

> As the Supreme Court has recently reiterated, in "cases involving facial challenges on Establishment Clause grounds, . . . we assess the constitutionality of an enactment by reference to the three factors first articulated in *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971)." *Santa Fe Ind. Sch. Dist. v. Doe*, 530 U.S. 290, 314 (2000) (internal quotation marks and citations omitted). The *Lemon* factors require that a challenged law (1) have a valid secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) not foster excessive state entanglement with religion. 403 U.S. at 612-13. We treat the excessive entanglement prong as a part of our "inquiry into a statute's effect." *Agostini v. Felton*, 521 U.S. 203, 233 (1997). We find the challenged laws do not pass constitutional muster under the *Lemon* test because they have a primary effect that both advances and inhibits religion.[7] *Commack*, 294 F.3d at 425.
>
> FN7: Plaintiffs contend we should judge the constitutionality of these laws under the standard of strict scrutiny, as in *Larson v. Valente*, 456 U.S. 228, 246 (1982), and defendants claim that, because this is a facial attack, we should apply the rule of

> *United States v. Salerno*, 481 U.S. 739, 745 (1987), requiring the Plaintiff to show that "no set of circumstances exists under which the (statute) would be valid." We need not answer either question because we conclude for the reasons given that, as to both questions, the laws fail the test of constitutionality even using the assumptions that are most accommodating to the State.

Petitioners attempt to bolster its specious position by arguing that in matters of *kashruth* [the practice of being kosher] all Jews start with the "orthodox Hebrew religious requirement" as their common point of reference. In the footnote, n.6, the State represents that "Had those provisions required the State to favor orthodox Judaism over Conservative Judaism, the United Synagogue of America presumably would have opposed the legislation. While the Respondents do not know the circumstances surrounding the enactment of the Statute, apparently the Petitioner has forgotten that the United Synagogue of Conservative Judaism, the parent body for Conservative Jewish congregations, joined in an *amicus* brief to the Second Circuit in support of Respondents.

IV. THE CHALLENGED STATUTE CONSTITUTES A GOVERNMENT ENDORSEMENT OF RELIGION IN VIOLATION OF THE ESTABLISHMENT CLAUSE

It defies credibility that the Petitioner criticize the Second Circuit for failing to adopt the "reasonable observer's" viewpoint as to whether or not the challenged statute favors orthodox Judaism over other denominations of Judaism. It is undenied that virtually each of the

intervening organizations has publicly declared that non-orthodox denominations of Judaism are illegitimate and/or unauthentic. It appears to be that, consistent with the position of the Petitioners and their fellow members of the orthodox Jewish community, an acknowledged powerful voting block, the State has historically taken the position that, in the context of the challenged statute, *kosher* is synonymous with "orthodox Hebrew religious requirements."

Judge Gershon found that, as the Respondents contend, the settled interpretation of the challenged statute is that "*kosher*" means "in accordance with orthodox Hebrew religious requirements"; a conclusion she finds confirmed by the brief of Robert Abrams, as Attorney General of the State of New York, in *Ran-Dav's County Kosher, Inc. v. New Jersey*, 129 N.J. 141, 608 A.2d 1353 (1992), *cert. denied*, 507 U.S. 952 (1993), *Commack*, 106 F. Supp.2d 4, 450. The numerous judicial decisions holding that the Statute defines "*kosher*" as synonymous with "orthodox Hebrew religious requirements," collaterally estop the State from now arguing otherwise.

To enforce the Statute enmeshes religious leaders in the exercise of substantial government powers contrary to this court's consistent interpretation of the Establishment Clause; "the objective is to prevent, as far as possible, the intrusion of either Church or State into the precincts of the other." *Larkin v. Grendel's Den*, 459 U.S. 116, 126 (1982). "Some limited and incidental entanglement between church and state is inevitable in a complex modern society," *Id.* at 23. The Statute's adoption of orthodox Hebrew religious requirements as the criteria is neither "limited" nor "incidental," "'fusion of governmental and

religious functions'" in the area of religious dietary doctrine. *Id.* at 126. Such "direct cooperation between state officials and religious ministers" is flatly forbidden by the First Amendment, *McGowan v. Maryland,* 366 U.S. 420, 452 (1961), which prohibits a State from employing religious authorities as an adjunct of the civil law enforcement regime "to perform the function of interpreting and applying state standards." *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. at 451. The constitutional vice is compounded by the fact that the State, to enforce the regulations, must decide which religious authority's interpretation of Judaism's dietary laws is truly orthodox. In doing so the State must inevitably become embroiled in deciding ecclesiastical questions that are wholly inappropriate for resolution by civil authorities. *See, e.g., Presbyterian Church*, 393 U.S. at 440; *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. at 709.

The *kosher* regulations are also violative of the Establishment Clause because the intermingling of state power and religious doctrine creates "the danger of political fragmentation and divisiveness on religious lines." *Grendel's Den*, 459 U.S. at 127. The record in this case conclusively establishes that the State's enforcement of the Statute provoked precisely the sort of turmoil identified by this Court in *Grendel's Den*. In that case, where the Court struck down a law delegating a role in liquor licensing to local churches, this Court noted the risk that this power could be "employed for specifically religious goals, for example, favoring liquor licenses for members of that congregation or adherents of that faith." 459 U.S. at 125. In New York, the abuse was manifested by the State's targeting of purveyors of *kosher* food which was not under orthodox Jewish supervision.

In *Lee v. Weisman*, 112 S.Ct. 2649 (1992), this Court reasserted the proposition that the state must not insinuate itself into sectarian "religious debate," because "[a] state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed." *Id.* at 2657, 2658 (Kennedy, J., for the Court). "Government may neither promote nor affiliate itself with any religious doctrine or organization, nor may it obtrude itself in the internal affairs of any religious institution." *Id.* at 2661-62 (Blackman, J., joined by Stevens and O'Connor, JJ., concurring). This reflects the "Madisonian concern that secular and religious authorities must not interfere with each other's respective spheres of choice and influence." *Id.* at 2663 n.3 (Blackmun, J., joined by Stevens and O'Connor, JJ., concurring). By allowing the state courts to arbitrate between competing understandings of just what is *kosher* under Jewish law, the State "invite[s] the courts to engage in comparative theology. I can hardly imagine a subject less amenable to the competence of the . . . judiciary, or more deliberately to be avoided where possible." *Id.* at 2671 (Souter, J., joined by Stevens and O'Connor, JJ., concurring).

In *Weisman* even the dissenters agreed that the Establishment Clause "ruled out of order government-sponsored endorsement of religion – even when no legal coercion is present . . . – where the endorsement is sectarian, in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world, are known to differ." *Id.* at 2683-84 (Scalia, J., joined by Rehnquist, C.J., and White and Thomas, JJ., dissenting). The state may not "lend its

power to one or the other side in controversies over religious authority or dogma." *Employment Division, Dept. of Human Resources v. Smith*, 494 U.S. 872, 877 (1990) (Scalia, J., for the Court). That is precisely what the State has done and now tries to justify.

Thus, the nuances of the *Lemon* test and the controversy surrounding them are simply not implicated by the decision below. The outcome was dictated by Establishment Clause principles – on which this Court is unanimous – that forbid state involvement in sectarian religious debates and the use of coercive state power to promote religious doctrine. The decision below presents no occasion to choose between the *Lemon* test and any alternative "coercion" theory of the Establishment Clause.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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